

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

IN THE MATTER OF THE)	
PERSONAL RESTRAINT OF:)	No. 80464-2-I
)	
JOSEPH GLEN BLUE,)	ORDER DISMISSING
)	PERSONAL RESTRAINT
Petitioner.)	PETITION
_____)	

Joseph Blue challenges the amended judgment and sentence entered following his jury conviction on one count of first degree rape in Island County Superior Court Cause No. 07-1-00200-7. Blue also challenges the March 2019 decision of the Indeterminate Sentencing Review Board (ISRB) extending his minimum sentence. In order to obtain relief by means of a personal restraint petition, a petitioner bears the burden of showing that he or she is under restraint and that the restraint is unlawful. RAP 16.4; see also In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994); In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Because Blue fails to meet this burden with respect to his ISRB claim, and because Blue's challenges to his judgment and sentence are time-barred, the petition must be dismissed.

In 2008, a jury convicted Blue of one count of first degree rape and one count of second degree assault for a violent attack on his girlfriend over the course of several hours. The physical abuse consisted of Blue beating the victim about

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the head, gouging her eyes with his thumbs, biting her until she bled, hitting and kicking her, and urinating on her. On direct appeal, this court held that Blue's assault conviction should have merged into the rape conviction. See State v. Blue, No. 62229-3-I, noted at 155 Wn. App. 1001, rev. denied, 169 Wn.2d 1022 (2010). On remand in 2011, the court entered an amended judgment and sentence vacating the assault conviction and sentencing Blue under former RCW 9.94A.712 to an indeterminate sentence of 123 months to life for the rape conviction.

In January 2016, Blue's initial Sex Offender Treatment and Assessment Program (SOTAP) plan assessed his risk to reoffend as high. Upon completion of SOTAP in January 2017, his risk to reoffend was still assessed as high, with a decreased level of treatment needs only in the area of deviant sexual interests. However, his SOTAP discharge summary concluded that Blue had demonstrated sufficient progress toward reducing risk relevant factors. In 2017, the End of Sentence Review Committee (ESRC) concluded that Blue had a low/moderate risk to reoffend based on the Static 99R risk assessment tool. The ESRB aggravated Blue's community notification risk level from I to II based on Blue's history of verbally, emotionally, and physically assaulting his female partners while intoxicated and the fact that he had not yet entered into the required drug treatment program.

On March 28, 2017, the ISRB conducted Blue's first releasability hearing under RCW 9.95.420. In April 2017, the ISRB found Blue releasable after concluding that it was not more likely than not that he would commit another sex

offense. The ISRB noted that by the time of the hearing Blue had completed sexual deviancy treatment and chemical dependency treatment, thereby mitigating “two of his highest risks.” The ISRB ordered Blue released on July 11, 2017, subject to a number of conditions in addition to those imposed by his judgment and sentence.

On August 28, 2017, Blue was terminated from the community portion of SOTAP for violating several conditions of community custody and conditions of release, including engaging in substance use, participating in an undisclosed relationship, and possessing sexually suggestive materials. On October 12, 2017, the Board held a hearing to address the alleged violations. Blue pleaded guilty to two counts of unlawful substance abuse. The ISRB additionally found Blue guilty of engaging in a romantic relationship without Department of Corrections (DOC) approval and failing to complete the community portion of SOTAP. The ISRB found Blue not guilty of two new sexual offenses committed against his wife, in part because his wife refused to testify. The ISRB also noted concerns regarding Blue’s “name calling, manipulation, and hostility towards Ms. Blue in the text messages.” The ISRB further noted that Blue, while hospitalized for methamphetamine use, spontaneously told DOC staff watching him about a sexually degrading practice involving women and drugs. Blue also took issue with the treatment requirement that he not be allowed to possess sexually explicit material, even though the rationale for this requirement had been repeatedly discussed during therapy. The ISRB concluded:

[Blue] was released in July 2017, and it appears he immediately began getting in a relationship with a woman who was not his wife

and using drugs. Mr. Blue's index offense involved a violent physical and sexual assault against a girlfriend and the use of drugs. In addition, he has previous crimes involving drugs and sex or violence against women. The Board believes that Mr. Blue currently presents a risk to the community due to his immediate use of drugs, getting involved with women and his attitude of entitlement and hostility towards women.

The ISRB returned Blue to total confinement for 24 months and recommended that he repeat SOTAP and chemical dependency treatment in prison.

While in prison, Blue reenrolled in the prison portion of SOTAP. The January 2019 SOTAP discharge summary provided the following summary of Blue's progress during treatment:

Initially, Mr. Blue appeared resistant to the treatment process, often identifying he did not need to be in treatment. He was observed blaming others for his current incarceration, becoming argumentative and resistant to feedback. As he progressed in treatment, he was observed utilizing new ways to manage his emotions and healthy ways to communicate his concerns. He appeared to become more receptive to feedback and integrating the information he learned for others. By the end of treatment, he appeared to have a realistic idea of his high risks and the interventions he can utilize to manage them.

The ESRC summary report noted that ESRC had aggravated Blue's level of risk to reoffend based on the Static 99R tool from low/moderate to moderate/high, which aggravated his community notification risk level from II to III, "because he has a pattern of behavior that increases his risk of sexual recidivism and past interventions/treatment have not deterred sexually deviant behavior." The report also noted that ESRC's subcommittee on sexually violent predators (SVPs) recommended that the ISRB not release Blue until he has undergone a forensic psychological evaluation to assess whether he meets civil commitment criteria under RCW 71.09.020. The report further noted that in January 2018 Blue was

diagnosed with major depressive disorder and moderate, recurrent narcissistic personality disorder.

The hearing at issue in this petition took place on February 26, 2019. In preparation for the hearing, the ISRB reviewed Blue's ISRB file. Blue's counselor Ann Sawyer summarized Blue's programming and noted that he had received no serious infractions since returning to prison. She also noted that Blue had received seven negative, two neutral, and three positive behavior observations. One of the negative observations involved Blue getting "brisk" and being manipulative with staff. Blue's SOTAP specialist Kerry McCarthy testified that Blue struggled in the beginning but did complete treatment and made progress toward the end. Her biggest concerns were Blue's ability to manage his negative emotions, his ability to ask for help, owning his own behaviors, and healthy relationship stability.

Blue testified that he agrees with the details outlined in the ESRC report. He claimed not to remember some of the details of the previous offense due to an alcohol induced blackout. Regarding his violation behavior during his brief period of release, he stated that "he was really catastrophizing everything and had anxiety." He said that he contacted another woman because he and his wife were fighting and he wanted to show her he didn't need her. He said he believed his wife alleged he raped her to get back at him. He also said he thought that if he got a "hot" urinalysis test result, he would get the help he needed.

On March 29, 2019, the ISRB issued its written decision finding Blue not releasable and adding 24 months to his minimum term. The ISRB summarized the reasons for its decision as follows:

This was a deferred decision using a structured decision-making framework that takes into consideration; the statistical estimate of risk, criminal history, release history, ability to control behavior, responsivity to programming, demonstrated offender change, release planning, discordant information, and other case specific factors. Mr. Blue is not releasable based on the following:

- End of Sentence Review Committee (ESRC) has referred him for a Forensic Psychological Evaluation to determine if he meets the criteria as a sexually violent predator under RCW 71.09
- Assessed as a Moderate/High risk to sexually reoffend and a Risk Level Three for community notification by the ESRC
- Risk related behavior needs to be addressed more fully
- Chemical dependency issues not addressed

The ISRB recommended that Blue “should enter into and successfully complete the SOTAP Aftercare program, Redemption, and Chemical Dependency Treatment if found eligible and available.”

Blue now raises several challenges to the challenges to the ISRB’s March 2019 decision to extend his minimum term.¹ First, he appears to argue that his indeterminate sentence exceeds the ISRB’s statutory jurisdiction by unlawfully

¹ Blue filed a prior personal restraint petition challenging the ISRB’s March 2019 decision on similar grounds. This court dismissed that petition because the record Blue provided was insufficient to review whether the ISRB’s decision constitutes an unlawful restraint. See No. 80170-8-I.

imposing a sentence outside the standard sentencing range without following the exceptional sentencing procedures and without being a court. Blue is mistaken.

Sentencing under RCW 9.94A.507 is applicable if an offender is convicted of certain sex offenses, including rape in the first degree.² RCW 9.94A.507(1)(a)(i). For such sentences, the statute provides that the sentencing court is required to impose a minimum and maximum term. RCW 9.94A.507(3). The maximum term “shall consist of the statutory maximum sentence for the offense.” RCW 9.94A.507(3)(b). The statutory maximum sentence for Class A felonies is life. RCW 9A.20.021(1)(a). The minimum term “shall be either within the standard range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.” RCW 9.94A.507(3)(c). Thus, under the indeterminate sentencing framework, the standard sentence range does not set the upper limit of the term of total confinement. Rather, that range sets the lower end of the term of total confinement unless RCW 9.94A.535 applies. The upper limit is set by the statutory maximum for the crime of conviction. RCW 9.94A.507(3)(b).

The ISRB “shall” order the offender released at the end of the minimum term unless it determines by a preponderance of the evidence that it is more likely than not that the offender will commit sex offenses if released. RCW 9.95.420(3)(a). If the ISRB does not order the offender released, it establishes a

² Blue was sentenced under RCW 9.94.712, which was recodified in 2008 under RCW 9.94A.507. Laws of 2008 ch. 231 §§ 33, 56. The relevant statutory language is the same.

new minimum term as provided in RCW 9.95.011. Id. If an offender released under RCW 9.95.420 violates a condition of community custody, the offender “is entitled to a hearing before the board or a designee prior to the imposition of sanctions.” RCW 9.95.435(3). The ISRB may impose a variety of sanctions, including the revocation of the release to community custody. RCW 9.95.435(3).

Blue was convicted of rape in the first degree, a class A felony in violation of RCW 9.94A.040(1)(c). The court established a standard sentence range of 93-123 months. He received an indeterminate sentence with a minimum term of 123 months and a maximum term of life. The court also imposed community custody “for any period of time the defendant is released from total confinement before the expiration of the maximum sentence” as required by RCW 9.94A.507(5). Because Blue’s maximum sentence is life, he will be under community custody for the remainder of his life once released from total confinement. The ISRB revoked Blue’s community custody in 2017 after finding him guilty of community custody violations and imposed a new minimum term of 24 months. In March 2019, following a hearing, the ISRB found Blue not releasable and imposed a new minimum term of 24 months. In doing so, the ISRB exercised its statutory discretion to impose a new minimum term within the sentencing range established by statute and imposed by the superior court. Blue’s challenge to the ISRB’s jurisdiction is without merit.

Blue further asserts that the ISRB’s March 29, 2019 written decision finding him not releasable and adding 24 months to his minimum term was an abuse of

discretion. He contends that the four reasons the ISRB gave for its decision are insufficient grounds to deny his conditional release.

An ISRB decision setting a new minimum term is reviewed for an abuse of discretion, and this court gives substantial deference to the judgment of the ISRB. In re Pers. Restraint of Locklear, 118 Wn.2d 409, 418, 823 P.2d 1078 (1992). An abuse of discretion may be found where the ISRB fails to follow its own procedural rules for parolability hearings or where the ISRB bases its decision on speculation and conjecture only. In re Pers. Restraint of Dyer (Dyer I), 157 Wn.2d 358, 363, 139 P.3d 320 (2006). The petitioner bears the burden to prove the ISRB abused its discretion. Addleman, 151 Wn.2d 769, 776, 92 P.3d 221 (2004).

In the case of a sex offender serving an indeterminate sentence, prior to the end of the minimum term DOC must provide a recommendation about whether to release the offender. RCW 9.95.420(3)(a). The ISRB then conducts a hearing “to determine whether it is more likely than not that the offender will commit sex offenses if released on conditions to be set by the board.” RCW 9.95.420(3)(a); WAC 381-90-050(3). The ISRB “shall” order the offender released unless it determines by a preponderance of the evidence that it is more likely than not that the offender will commit sex offenses if released. RCW 9.95.420(3)(a). In making a release decision, the ISRB may consider:

- (a) The length of time necessary for the offender to complete treatment and programming;
- (b) The offender’s failure to participate in required evaluations;
- (c) The offender’s proposed release plan; and
- (d) Other pertinent information.

WAC 381-90-050(4). All relevant information is admissible, and the factors that the ISRB may consider include but are not limited to:

- (1) Refusal to participate in available programs or resources designed to assist an inmate to reduce the risk of reoffense (e.g., stress and anger management, victim awareness, substance abuse treatment, sex offender treatment).
- (2) Serious and repetitive disciplinary infractions during incarceration.
- (3) Evidence of an inmate's continuing intent or propensity to engage in sex offenses.
- (4) Statements or declarations by the inmate of intent not to comply with conditions of community custody.
- (5) End of sentence review determination based on actuarial assessments identifying risk to sexually reoffend.

WAC 381-90-140; 150.

The ISRB's first reason for finding Blue not releasable is that the ESRC "has referred him for a Forensic Psychological Evaluation to determine if he meets the criteria as a sexually violent predator under RCW 71.09."³ Blue asserts that "[t]his isn't evidence Blue will reoffend with a violent sexual offense if conditionally released." Blue further asserts that this reason for finding him not releasable violates due process because the evaluation has not taken place.

A petition may be filed alleging that a person is an SVP when it appears that a person previously convicted of a sexually violent offense is about to be released from total confinement. RCW 71.09.030(1)(a). DOC policy requires that, before the ESRC may refer an offender to the ESRC SVP subcommittee, it must

³ A sexually violent predator is "any person who has been convicted or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18).

have found that the offender “appears to meet” the statutory criteria for civil commitment as an SVP. DOC Policy 350.500. In developing its report, the ESRC has “access to all relevant records and information in the possession of public agencies relating to the offenders under review.” RCW 72.09.345(4). The ESRC report may include a prediction of the likelihood that the offender will commit new sex offenses if released based upon administration of actuarial risk assessment instruments and the sexual and criminal history of the offender, among other factors. WAC 381-90-050(2).

The mere appearance that an offender may be a sexually violent predator is not sufficient, by itself, to deny release. See Matter of Parejo, 5 Wn. App. 2d 558, 576, 428 P.3d 130 (2018) (holding that RCW 9.95.115 does not prohibit release unless the person is “subject to” civil commitment as an SVP under the procedures of chapter 71.09 RCW). But this is not what happened in Blue’s case. Rather, the ISRB considered the ESRC’s recommendation, and the facts underlying that recommendation, as part of the broad evidence to be weighed in making its release determination. The ESRC found that Blue has a “pattern of behavior that increases his risk of sexual recidivism and past interventions/treatment have not deterred sexually violent behavior.” The ISRB did not abuse its discretion in partially basing its releasability decision on the ESRC’s recommendation to have Blue evaluated as an SVP.

The ISRB’s second reason for finding Blue not releasable is that the ESRC assessed him as a moderate/high risk to sexually reoffend and a risk level three for community notification. Blue objects to this reason on several grounds. He

first asserts that this reason violates double jeopardy by prosecuting and punishing him twice for the same crime. A court entering multiple convictions for the same offense violates double jeopardy. State v. Freeman, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005). However, as discussed above, the ISRB made a discretionary decision following a hearing to extend Blue's minimum term within the limits of the indeterminate life sentence imposed by the trial court. Blue was not punished or prosecuted twice for the same offense. Blue next asserts that this reason is unsupported by evidence. But the ISRB expressly relied on the ESRC risk assessment, which in turn is based on extensive evidence regarding Blue's criminal offenses, patterns of behavior, and results of actuarial risk assessments. Blue further asserts that this reason violates due process because it is based on evaluations that have not been conducted and/or were conducted without him present to defend against what he views as inaccurate allegations or statements. For a sex offender facing a releasability hearing under RCW 9.95.420, minimal due process includes the ISRB's review of the offender's file and the offender's opportunity to be heard by the ISRB. In re McCarthy, 161 Wn.2d 234, 242, 164 P.3d 1283 (2007). Here, Blue was given a copy of his file a month before the scheduled hearing so he could review it and raise his concerns there. Blue had the required notice and opportunity to be heard. And the ISRB's decision was supported by evidence in the record, not assumptions or conjecture.

The ISRB's third reason for finding Blue not releasable is that his risk related behavior needs to be addressed more fully. Blue points out that he successfully completed several relevant programs after being returned to total

confinement in 2017. Although Blue's institutional programming and behavior appear to have been factors in his favor, the ISRB expressed concern that Blue nevertheless violated several conditions almost immediately upon release to community custody in 2017. Moreover, the January 2018 SOTAP findings indicated ongoing issues, including Blue's stated belief that he did not need treatment, his tendency to minimize and justify his abusive behavior towards women, getting into verbal arguments with staff, and looking for relationships with women he believed would be easier to manipulate. Blue had more areas with high treatment needs at the end of his second SOTAP than he did at the end of his first SOTAP. The ISRB did not abuse its discretion in basing its releasability decision in part on Blue's need to more fully address his risk-related behavior in an institutional setting.

The ISRB's fourth reason for finding Blue not releasable is that his chemical dependency issues were not addressed. Blue asserts that this reason is inaccurate because he was attending a 12-step program through a religious group in prison. However, when Blue was released in 2017, the ISRB identified sexual deviancy and chemical dependency as two of his highest risks. Blue abused alcohol and drugs during his brief release to community custody in 2017, behaviors that significantly contributed to his revocation of community custody. According to the ISRC, Blue has not participated in a chemical dependency treatment assessment or treatment offered by DOC since his return to prison. Given Blue's ongoing challenges in this area and the nexus between Blue's drug use and sex crimes, the ISRB did not abuse its discretion in finding him not

releasable in part because he has not satisfactorily addressed his chemical dependency issues.

In sum, the four stated reasons the ISRB gave for its decision finding Blue not releasable with conditions were authorized by statute and properly based on a preponderance of the evidence. The ISRB's decision was not an abuse of discretion. Blue has not demonstrated that his restraint is unlawful.

Blue additionally raises claims regarding his underlying judgment and sentence. A personal restraint petition that challenges a judgment and sentence must be filed within one year after the judgment and sentence becomes final. RCW 10.73.090. A petitioner bears the burden of showing that his petition was timely filed. In re Pers. Restraint of Quinn, 154 Wn. App. 816, 833, 226 P.3d 208 (2010). Blue's judgment and sentence became final on October 29, 2010, the date the mandate was issued in his direct appeal. He filed this petition on September 13, 2019, well after the expiration of the one-year time limit. Thus, Blue's challenge to his judgment and sentence is time-barred under RCW 10.73.090(1) unless Blue can show that: (1) his judgment and sentence is facially invalid or was not entered by a court of competent jurisdiction, or (2) an exception under RCW 10.73.100 applies.⁴

⁴ "The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

- (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
- (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
- (3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;
- (4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
- (5) The sentence imposed was in excess of the court's jurisdiction; or

Blue argues that the trial court erred in “merging the non-sexually motivated assault with the most violent sexual assault possible,” thereby exempting him from the time bar under RCW 10.73.100(4) and (5).⁵ He further asserts that the prosecutor “overcharged” him based on insufficient evidence, thus exempting him from the time bar under RCW 10.73.100(4).

In September 2019, this court dismissed as untimely Blue’s personal restraint petition, No. 80170-8-I, in which he asserted that the same alleged errors rendered the judgment and sentence facially invalid. Blue’s conclusory assertions in the present petition do not support an exception to the time bar under RCW 10.73.100(4) or (5). As discussed above, Blue has not shown that the sentence imposed was in excess of the court’s jurisdiction. And in 2012, this court dismissed as unsupported by the record Blue’s personal restraint petition, No. 67788-8-I, challenging his convictions based on insufficient evidence. This court generally will not review issues that were raised and rejected on direct appeal or in a prior personal restraint petition unless the interests of justice require relitigation.

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.”

RCW 10.73.100.

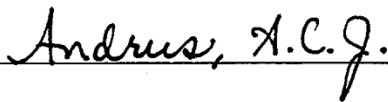
⁵ At sentencing, Blue argued, the State conceded, and the court found that the assault merged into the rape conviction. Nevertheless, the court recorded the assault conviction on the judgment and imposed a separate sentence for the offense. On direct appeal, this court adopted the State’s concession of error and remanded to vacate the assault conviction. Blue thus invited the action he now claims as error. See In re Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014) (party who sets up error at trial cannot claim that very action as error on appeal).

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See In re Pers. Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994); In re Pers. Restraint of Haverty, 101 Wn.2d 498, 502-03, 681 P.2d 835 (1984). Blue's successive and untimely challenge to his judgment and sentence must be dismissed. In re Pers. Restraint of Bell, 187 Wn.2d 558, 564, 387 P.3d 719 (2017); In re Pers. Restraint of Turay, 150 Wn.2d 71, 74 P.3d 1194 (2003). And Blue has not met his burden of demonstrating that the ISRB's decision finding him not releasable and extending his minimum term renders his restraint unlawful.

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).



Acting Chief Judge